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In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC), PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND WCCO RADIO, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether, following an evidentiary hearing, the Federal Communications Commission rationally weighed competing policies in determining that the public interest is best served by not allowing a nighttime operation on the clear channel frequency 830 kHz that interferes with the skywave service of the dominant station on that frequency.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-33) is reported at 744 F.2d 827. The decision of the Federal Communications Commission (Pet. App. 39-63) is reported at 91 F.C.C. 2d 635. The opinion and order of the Commission denying reconsideration (Pet. App. 64-73) is not reported. The supplemental initial decision of the administrative law judge (Pet. App. 74 *et seq.*) is reported at 91 F.C.C. 2d 659.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1984. The petition for a writ of certiorari was filed on December 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner City of New York Municipal Broadcasting System (WNYC) is licensed to operate radio station WNYC-AM, a 1 kilowatt (kW) daytime station on 830 kilohertz (kHz), New York City. This is a clear channel frequency on which Station WCCO, Minneapolis, Minnesota, is the dominant station. Under the Commission's clear channel rules, the dominant station on a clear channel frequency is entitled to protection at night from co-channel interference within its 0.5 mV/m 50% skywave contour. 47 C.F.R. 73.182(v).[1] Beginning in 1943, however, the Commission, in a series of Special Service Authorizations (SSAs), allowed WNYC-AM to operate from 6:00 a.m. to 10 p.m. (EST) even though WNYC was thereby interfering with WCCO's protected skywave contour during WNYC's pre-sunrise and post-sunset operations.[2]

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[1]The Commission's judgment has long been that a signal must be at least 0.5 mV/m in intensity in order to be usable. The reference to 50% means that a signal of at least that intensity must be received half the time at a particular location in order for that location to come within the dominant station's protected skywave contour. See 47 C.F.R. 73.182(i). This contour is generally located 700-750 miles from the dominant station's transmitter. The skywave contour refers to a station's skywave signal, which travels upward and outward from the transmitter into the ionosphere. The atmosphere absorbs this signal during the day, but at night the signal is reflected back to earth at distances far removed from the transmitter. Many variables, such as time of year, weather, or sunspot activity, affect the intensity of a skywave signal, resulting in "fading" from time to time in skywave reception. Although skywave service is therefore considered "secondary" under the Commission's rules, the ability of skywave signals to render a useful nighttime service over wide areas has been at the heart of the Commission's longstanding policy of relying on the dominant clear channel stations to provide nighttime service to remote areas that are otherwise unserved or underserved by radio. See generally Pet. App. 3-6 & n.2, 44-45 n.19.

[2]The SSAs originally were granted to provide "needed * * * services" during World War II and conveyed no permanent rights (Pet. App. 7 & n.4).

In 1954, the Commission commenced an evidentiary hearing to determine whether the public interest would be served by authorizing pre-sunrise and post-sunset operations by WNYC-AM on a regular basis (Pet. App. 41).[3] The Commission held final action on this proceeding in abeyance while it conducted a rulemaking proceeding to determine the most efficient use of the clear channel frequencies. *Clear Channel Broadcasting*, 31 F.C.C. 565, reconsideration denied, 45 F.C.C. 400 (1962), aff'd *sub nom. Goodwill Stations, Inc.* v. *FCC*, 325 F.2d 637 (D.C. Cir. 1963). The Commission there decided to allow a new station to operate at night on 13 of the 25 clear channels, provided that the new station would not cause interference within the dominant station's 0.5 mV/m 50% skywave contour. 31 F.C.C. at 572-573.

The Commission noted that 830 kHz was not one of the clear channels on which the rulemaking had authorized a new station to operate at night, but the Commission recognized that WNYC's use of that frequency at night was the subject of a pending adjudicatory proceeding. The Commission determined that the generic clear channel rulemaking was not the place to resolve whether WNYC should

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[3]When the hearing commenced, WNYC was operating at 1 kW. During the pendency of the proceeding, it proposed to change its antenna site and increase its power to 50 kW (Pet. App. 42). (The Commission in 1962 had suggested that *if* it were determined in the then-pending adjudicatory proceeding that WNYC should be allowed to operate at night, the resulting interference with WCCO might be no greater, and perhaps less, if WNYC increased its power, provided that this increase was accomplished by a move to a different transmitter site and the use of an antenna with a different directional pattern. *Clear Channel Broadcasting*, 45 F.C.C. 400, 410-411. The WNYC proceeding was enlarged to consider WNYC's 50 kW proposal. *City of New York Municipal Broadcasting System (WNYC)*, 8 F.C.C. 2d 1047 (1967)). The Commission's conclusion now in issue was that the public interest would not be served by allowing WNYC to operate at night pursuant to either its previous 1 kW operation or its proposed 50 kW operation (Pet. App. 62).

operate at night. 31 F.C.C. at 591; Pet. App. 10-11. Instead, the clear channel rulemaking merely authorized the acceptance of applications on 830 kHz. The Commission explained that such authorization would clear the way "procedurally" for WNYC to apply for nighttime operations on 830 kHz "in the event it is decided in the adjudicatory proceedings[4] that such operations are in the public interest." 31 F.C.C. at 591-592; 47 C.F.R. 73.25 n.2, as quoted in 31 F.C.C. at 605-606.[5]

2. In a decision adopted in September 1982, the Commission concluded that on balance the public interest would best be served by halting WNYC-AM's nighttime operations (Pet. App. 39-62).[6] The Commission observed that WNYC's nighttime operations interfered with WCCO's skywave signal in a significant portion of WCCO's secondary service area,[7] some of which, unlike New York City, is not well

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[4]In addition to the issue of WNYC's nighttime operations on 830 kHz, the Commission was referring to a then-pending adjudicatory proceeding in which a subordinate station on another clear channel frequency, 640 kHz, in Ames, Iowa, was seeking approval for its presunrise operations that interfered with the nighttime skywave service of the dominant station on that channel, located in Los Angeles. 31 F.C.C. at 591. That proceeding was resolved in 1969 in favor of protecting the dominant station. *Iowa State University of Science & Technology*, 19 F.C.C.2d 36.

[5]The Commission on reconsideration again made clear that its action in the clear channel rulemaking authorizing the acceptance of applications on 830 kHz should not be interpreted as passing on the merits of WNYC's nighttime operations, which remained to be decided in the adjudicatory proceeding that had commenced in 1954. 45 F.C.C. at 411; Pet. App. 11-12.

[6]In so ruling, the Commission reversed the Administrative Law Judge's *Supplemental Initial Decision* of June 1978 (Pet. App. 74 *et seq.*), which had granted WNYC's application to operate at night at 50 kW.

[7]Continuation of WNYC-AM's 1 kW SSA operations would cause nighttime interference to 7,905,300 persons in a 149,600 square mile area within WCCO's 0.5 mV/m 50% skywave contour. Under its proposal to operate from a new site at 50 kW with a directionalized antenna,

served (Pet. App. 53).[8] The Commission recognized that WNYC-AM's programming was "highly meritorious"[9] and in some cases "unique," but it found that this programming generally had "at least a rough equivalent" in the programming of other New York City radio stations (Pet. App. 47-49). The Commission further concluded that, with a "few exceptions" such as live coverage of hearings held at night, WNYC-AM's programming could be presented during daytime hours (*id.* at 49, 53). To the extent that certain programming could be presented effectively only at night, or the licensee wished to present more material than was possible during daytime hours only, the Commission pointed out that the licensee of WNYC-AM was also the

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WNYC would cause nighttime interference to 7,158,600 persons in a 125,800 square mile area within WCCO's 0.5 mV/m 50% skywave contour. The 50 kW interference area included portions of eight states (Michigan, New York, Pennsylvania, Ohio, West Virginia, Kentucky, Tennessee, and Mississippi). The area of interference included a "white area" (no primary aural signal) with 51,000 persons and a "gray area" (only one other primary aural signal) with 195,100 persons. (Primary service refers to the area in which a station's ground wave is not subject to objectionable interference or fading.) All portions of the interference area receive at least ten other secondary radio services. Pet. App. 44-45.

[8]All of the areas that WNYC had been serving at night or would serve at night under its 50 kW proposal receive at least five primary nighttime aural signals. New York City itself has 28 full-time commercial radio stations and three educational stations licensed to it, and an additional 18 commercial stations and four educational stations are licensed within the New York Standard Metropolitan Statistical Area outside of New York City. Pet. App. 43.

[9]WNYC-AM is a non-commercial public service-oriented station that serves as an adjunct to the city government. It is affiliated with and is a "flagship" station of the National Public Radio System. The station's programming consists of news, public affairs, and other informational programming (45%); classical music (35%); and spoken word presentations, such as drama (20%). Pet. App. 44-45.

licensee of WNYC-FM, which is a full-time station (*id.* at 51-52).[10]

The Commission thus concluded that petitioner had not shown that WNYC-AM's "[nighttime] programming is required to satisfy the special needs and requirements of its service area which would justify its interference to clear channel station WCCO" (Pet. App. 43). The Commission added that petitioner had a "heavy burden of justifying a waiver of the fundamental allocation policy involved here," and concluded that that burden had not been met in this case (Pet. App. 53) (citing *WAIT Radio* v. *FCC*, 459 F.2d 1203 (D.C. Cir.), cert. denied, 409 U.S. 1027 (1972)).

3. The court of appeals affirmed (Pet. App. 1-33). The court recognized that this case required the Commission to balance " 'the interference caused to WCCO against the service WNYC renders during nighttime hours' " (*id.* at 30 (citation omitted)), and it concluded that the Commission had "rationally weighed the competing policies" in determining that the public interest would be best served by denying WNYC the authority to operate its AM station at night (*id.* at 2, 31). The court acknowledged that "residents of New York City [will] suffer a loss" in that WNYC-AM will not be available at night, but, as the court also noted, the Commission's decision will give listeners elsewhere an opportunity for the first time to receive WCCO's programming (*id.* at 32). "Choosing between these two groups was a determination for the Commission" (*ibid.*).[11]

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[10]The Commission noted that WNYC-AM and WNYC-FM are under the control of a common program manager, that there is no technical or legal impediment to the transfer of programming from one station to the other, and that there is currently a significant amount of duplication between the AM and FM schedules (Pet. App. 52).

[11]The court of appeals concluded that the Commission proceeding, although somewhat atypical, was in essence a "waiver" case because WNYC was seeking a result that was at odds with the Commission's

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. This Court has repeatedly recognized the Commission's broad discretion in giving content to the public interest standard of the Communications Act. See, *e.g.*, *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 593-594, 596 (1981). The Commission has defined as an important public interest objective the protection of the dominant clear channel stations from interference within their 0.5 mV/m 50% skywave contours. See *Clear Channel AM Broadcasting*, 78 F.C.C.2d 1345, 1365, reconsideration denied, 83 F.C.C.2d 216 (1980), aff'd *sub nom. Loyola University* v. *FCC*, 670 F.2d 1222 (D.C. Cir. 1982); *Clear Channel Broadcasting*, 31 F.C.C. at 573; see also Pet. App. 5 & n.2.

The Commission did not dispute the meritorious nature of WNYC-AM's cultural and informational programming, nor the obvious proposition that nighttime operations would allow more hours for meritorious programming to be broadcast. But these findings had to be weighed against the detriment of interference to WCCO's nighttime service area, involving persons who are "less well served" by radio than are the residents of New York City (Pet. App. 53). The Commission held that on balance the interference to WCCO's secondary service was a greater detriment than the

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fundamental allocation policy of protecting dominant clear channel stations from nighttime interference within their 0.5 mV/m 50% skywave contour (Pet. App. 18-20). Waiver cases require the applicant —here, WNYC-AM — to carry a heavy burden when seeking a variance from Commission rules (*ibid.*). Importantly, however, the court of appeals concluded that it would uphold the Commission's decision as rational and supported by substantial evidence even if it were assumed that the proceeding had not been a waiver case (*id.* at 18, 20).

benefit associated with continued nighttime operations by petitioner's station (*ibid.*).[12] As the Court stated in *FCC* v. *WNCN Listeners Guild*, 450 U.S. at 596 (citation omitted):

> The Commission's implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside * * *, for "the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance."

The court of appeals correctly declined to second-guess the Commission in this case. Petitioner's challenge "really centers on the wisdom of the agency's policy"; accordingly, it is "more properly addressed to legislators or administrators, not to judges." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 26, 27 (footnote omitted).

2. Petitioner's reliance (Pet. 14-20) on the 1961 clear channel rulemaking is misplaced. In that proceeding, which merely authorized the acceptance of WNYC's application for nighttime operations, the Commission made it abundantly clear that it was reserving decision on the substantive

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[12]Petitioner claims (Pet. 23-24) that the Commission was required to compare WNYC-AM's programming to that of WCCO. Aside from the fact that WNYC and WCCO serve different audiences, thereby making nighttime operations on WNYC of no benefit to WCCO's listeners, this argument ignores the fact that WNYC-AM's nighttime broadcasting, unlike WCCO's, is inconsistent with the Commission's fundamental allocation policy concerning the most efficient use of clear channel frequencies. The court of appeals thus correctly observed that the contest between WCCO and WNYC over nighttime broadcasting rights on 830 kHz "did not begin in equipoise" (Pet. App. 30). Petitioner instead properly had the burden of proving that nighttime broadcasting on its AM station was "essential to serve special needs and requirements" (*id.* at 53). The Commission's decision that petitioner failed to meet this burden, affirmed by the court of appeals, is a fact-bound determination that does not warrant this Court's review.

issues then pending in the WNYC adjudicatory proceeding (see Pet. App. 18 and pages 3-4, *supra*). When the Commission did render its substantive decision, it properly took into account "the fact that granting WNYC's request would involve making an exception to the current rules prohibiting stations of its type from broadcasting at night on clear channel frequencies and that those exceptions are rarely granted" (Pet. App. 20).[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[13]In any event, petitioner's contention that the 1961 clear channel rulemaking removed this case from the "waiver" category (see note 11, *supra*) is academic in view of the court of appeals' conclusion that it would affirm the Commission's decision regardless of the standard of review to be applied (Pet. App. 18-20).

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